UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DARWIN NOBOA, SALOMON NOBOA,
and JOHN ENRIQUE NOBOA,

Plaintiffs,

-against-

TORON RESTORATION CORP.,
FERNANDO POUSO, and JOSE LUIS
MARTINEZ,

Defendants.
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REPORT AND
RECOMMENDATION
14 CV 730 (ARR) (CLP)

POLLAK, United States Magistrate Judge:

On February 3, 2014, plaintiff Darwin Noboa filed this action on behalf of himself and all other similarly situated past and present employees who worked for defendants Toron Restoration Corp. ("Toron"), Fernando Pouso ("Pouso"), and Jose Luis Martinez ("Martinez") (collectively, "defendants"), seeking unpaid overtime wages pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. ("FLSA"), and the New York Labor Law §§ 650, et seq. ("NYLL"). (Compl.[1] ¶¶ 22, 34, 39-41, 43). Thereafter, on April 2, 2015, an Amended Complaint was filed, adding Salomon Noboa and John Enrique Noboa as plaintiffs and withdrawing the class and collective action claims. (Am. Compl.[2] ¶¶ 2-3).

Despite proper service, defendants Toron and Pouso failed to answer or otherwise respond to the Amended Complaint. On May 31, 2016, plaintiffs' counsel moved to withdraw representation of plaintiff John Enrique Noboa. According to counsel, John Enrique Noboa informed them on May 18, 2018 that he "no longer wished to move forward with [th]is cause of action against the Defendants as he believed that he would be unable to ultimately collect a judgment against the Defendants." (Kumar Aff.[3] ¶ 7). Additionally, counsel claimed that they were unable to contact John Enrique Noboa between May 18, 2016, and May 31, 2016. (Id. ¶ 8).

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[1]Citations to "Compl." refer to the plaintiff's Complaint, filed on February 3, 2014.

[2]Citations to "Am. Compl." refer to plaintiffs' Amended Complaint, dated April 2, 2015.

On July 13, 2016, plaintiffs' claims against defendant Martinez were dismissed without prejudice and plaintiffs' counsel's motion to withdraw as attorney for John Enrique Noboa was granted. John Enrique Noboa was directed to file a letter with the Court by August 4, 2016 indicating whether he wished to continue pursuing his claims against defendants. Nothing was filed with the Court.

On February 10, 2017, plaintiffs Darwin Noboa and Salomon Noboa filed a notice of voluntary dismissal of their claims without prejudice. Accordingly, on February 15, 2017, Darwin Noboa's and Salomon Noboa's claims were dismissed from the case, leaving John Enrique Noboa as the only remaining plaintiff.

On February 16, 2017, the Court notified plaintiff John Enrique Noboa that if he did not notify the Court by March 16, 2017, that he "wishes to continue pursuing this case pro se, that he has located new counsel, or that he no longer wishes to pursue his claims," the Court "may recommend that his claims be dismissed for failure to prosecute." (Order[4] at 2).

To date, the Court has not received any communication from John Enrique Noboa.

DISCUSSION

Courts have the power, under Rule 41 of the Federal Rules of Civil Procedure, to dismiss a case for failure to comply with court orders, treating such noncompliance as a failure to prosecute. Simmons v. Abuzzo, 49 F.3d 83, 87 (2d Cir. 1995). A dismissal for failure to prosecute may be ordered sua sponte. See LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 209 (2d Cir. 2001) (noting that "[a]lthough the text of Fed.R.Civ.P. 41(b) expressly addresses only the case in which a defendant moves for dismissal of an action, it is unquestioned that Rule 41(b) also gives the district court authority to dismiss a plaintiff's case sua sponte for failure to prosecute"); see also Minnette v. Time Warner, 997 F.2d 1023, 1027 (2d Cir. 1993). "Courts have repeatedly found that dismissal of an action is warranted when a litigant . . . fails to comply with legitimate court directives." Robinson v. Sposato, No. 13 CV 3334, 2014 WL 1699001, at *1 (E.D.N.Y. Apr. 24, 2014). In considering whether to dismiss an action, courts in this district consider five factors:

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[3]Citations to "Kumar Aff." refer to the Affirmation of Amit Kumar in support of plaintiffs' counsel's motion to withdraw as attorney, filed on May 31, 2016.

[4]Citations to "Order" refer to this Court's Order, filed on February 16, 2017.

> 1) the duration of plaintiff's failures or non-compliance; 2) whether plaintiff had notice that such conduct would result in dismissal; 3) whether prejudice to the defendant is likely to result; 4) whether the court balanced its interest in managing its docket against plaintiff's interest in receiving an opportunity to be heard; and 5) whether the court adequately considered the efficacy of a sanction less draconian than dismissal.

Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 63 (2d Cir. 2000). No one factor is dispositive in making this determination. See Lewis v. Rawson, 564 F.3d 569, 576 (2d Cir. 2009).

Here, the Baffa factors weigh in favor of dismissal. Plaintiff John Enrique Noboa's counsel indicated to the Court that, since at least May 18, 2016, Mr. Noboa did not wish to pursue his claims against defendants, which Mr. Noboa has not contested. (Kumar Aff. ¶ 7). Additionally, since his counsel's motion to withdraw as counsel was granted on July 13, 2016, plaintiff John Enrique Noboa has not taken any action to advance his claims. Rather, he failed to comply with two Court Orders directing him to notify the Court by August 4, 2016 and March

16, 2017 as to whether he wished to continue pursuing his claims. He failed to comply with both Orders. Courts in this district have found dismissal warranted for even shorter periods of noncompliance. See, e.g., Robinson v. Sposato, 2014 WL 1699001, at *2 (finding that failure to file a necessary document within 30 days as required by a court order constituted sufficient delay to warrant dismissal).

CONCLUSION

In light of the foregoing, the Court respectfully recommends that plaintiff John Enrique Noboa's claims be dismissed for failure to prosecute.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within fourteen (14) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's Order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72; Caidor v. Onondaga Cty., 517 F.3d 601, 604 (2d Cir. 2008).

The Clerk is directed to send copies of this Report and Recommendation to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

Dated: Brooklyn, New York
March 29, 2017

/s/ Cheryl L. Pollak

Cheryl L. Pollak
United States Magistrate Judge
Eastern District of New York